Hup Hin Soon Sdn Bhd v Chong Kin Lin & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S2(S1)-22-512 OF 2000
KAMALANATHAN RATNAM J
3 AUGUST 2001

Civil Procedure *— Striking out — Refiling of action — Striking out based on failure to attend mention date — Whether plaintiff should refile action or appeal — Whether court had gone on merits and had finally disposed off the matter*

Prior to the filing of this writ, the plaintiff had taken out three proceedings in respect of the same subject matter. The first proceeding was withdrawn, while the second proceeding was struck out. The third proceeding was also struck out because the plaintiff's solicitor failed to attend on the mention date ('the earlier decision'). The plaintiff's solicitor stated that the date of the mention was not entered into his diary. However, the court refused to reinstate the writ. The plaintiff then refiled the writ. The defendant argued before the deputy registrar that the plaintiff should not have been permitted to refile a similar suit but should have appealed against the earlier decision as this would constitute an abuse of the process of court, and applied to strike out the writ and statement of claim. The deputy registrar granted the defendant an order in terms. The plaintiff appealed. Both parties conceded that the application before the deputy registrar to strike out the writ was on purely technical grounds and they had not gone into the merits of the case.

Held, allowing the appeal with costs:

(1) The court was not concerned about whether the deputy registrar had or had not gone into the merits. What was of paramount importance was whether the learned judge who struck out the earlier writ in the third proceedings had gone into the merits. If the learned judge had indeed considered the merits of the case and then struck out the writ, then the plaintiff's only recourse was to appeal against that decision (see p*****).

(2) The judge who struck out the earlier writ because the solicitor for the plaintiff did not attend a mention or possibly a case management date, also refused to reinstate the writ on the grounds that the explanation of the plaintiff's solicitors was unacceptable. But nowhere had the defendants averred nor had they supported by an order of the court that the learned judge had gone into the merits. The striking off a writ because of non-attendance clearly meant that the court had not gone into the merits. In such a situation, there was nothing to appeal against. The plaintiff was perfectly at liberty to refile this suit (see p*****).

(3) Striking off a writ does not 'finally' dispose of the matter. A matter before the court is 'finally' concluded when evidence (whether

A oral or by affidavits) is adduced and the merits heard and adjudicated. Then it is conclusive and final and any decision made is final and the aggrieved party's next cause is to appeal. But where the merits have not been heard as in this case, this court could and must exercise its inherent discretion and if the justice of the case warrants the exercise of the discretion in favour of reinstating, it could and must (see p******).

[Bahasa Malaysia summary

Sebelum pemfailan writ ini, plaintif telah memulakan tiga prosiding berhubung perkara pokok yang sama. Prosiding yang pertama telah ditarik balik, sementara prosiding kedua telah dibatalkan. Prosiding ketiga juga telah dibatalkan kerana peguamcara plaintif telah gagal untuk menghadirkan diri pada tarikh sebutan ('keputusan terdahulu'). Peguamcara plaintif menyatakan bahawa tarikh sebutan tidak dimasukkan dalam diari beliau. Namun begitu, mahkamah enggan untuk menghidupkan semula writ tersebut. Plaintif kemudiannya telah memfailkan writ tersebut. Defendan berhujah di hadapan timbalan pendaftar bahawa plaintif tidak sepatutnya dibenarkan untuk memfailkan semula guaman yang sama tetapi sepatutnya telah membuat rayuan terhadap keputusan terdahulu kerana ini akan membentuk satu penyalahgunaan proses mahkamah, dan memohon untuk membatalkan writ dan pernyataan tuntutan tersebut. Timbalan pendaftar telah memberikan defendan satu perintah seperti dipohon. Kedua-dua pihak bersetuju bahawa permohonan di hadapan timbalan pendaftar untuk membatalkan writ tersebut adalah semata-mata atas alasan-alasan teknikal dan mereka tidak mempertimbangkan merit kes tersebut.

Diputuskan, membenarkan rayuan tersebut dengan kos:

(1) Mahkamah tidak peduli sama ada timbalan pendaftar telahpun atau tidak mempertimbangkan merit kes. Apa yang paling penting adalah sama ada hakim yang arif yang telah membatalkan writ yang terdahulu dalam prosiding ketiga telah mempertimbangkan merit kes. Jika hakim yang arif memang telah mempertimbangkan merit kes dan kemudian telah membatalkan writ tersebut, maka satu-satunya jalan plaintif adalah untuk membuat rayuan terhadap keputusan tersebut (lihat ms***).

(2) Hakim yang telah membatalkan writ yang terdahulu kerana peguamcara bagi pihak plaintif tidak hadir untuk satu sebutan atau kemungkinan satu tarikh pengurusan kes, juga telah enggan untuk menghidupkan semula writ tersebut atas alasan bahawa penjelasan peguamcara plaintif tidak boleh diterima. Tiada disebutkan di mana-mana bahawa defendan-defendan telah menegaskan mahupun mereka telah menyokong dengan satu perintah mahkamah bahawa hakim tersebut telah menyentuh

merit kes. Pembatalan satu writ disebabkan oleh ketidakhadiran dengan jelas bermaksud bahawa mahkamah tidak mempertimbangkan merit kes. Dalam keadaan begini, tiada apa untuk dirayukan. Plaintif dengan jelas bebas untuk memfailkan semula guaman ini (lihat ms***)

(3) Pembatalan satu writ tidak menyelesaikan perkara dengan 'muktamad'. Satu perkara yang dihadapkan ke mahkamah telah diputuskan dengan 'muktamad' apabila keterangan (sama ada secara lisan atau melalui afidavit-afidavit) telah dikemukakan dan merit didengar dan diadili. Kemudian barulah ia tidak dapat dipertikaikan dan muktamad dan apa-apa keputusan yang telah dibuat adalah muktamad dan langkah pihak terkilan yang selanjutnya adalah untuk membuat rayuan. Tetapi di mana merit tidak didengar seperti dalam kes ini, mahkamah ini boleh dan mesti menggunakan budi bicara sedia adanya dan jika keadilan kes ini mewajarkan penggunaan budi bicara yang menyebelahi untuk dihidupkan semula writ tersebut, ia boleh dan mesti berbuat demikian (lihat ms***).]

Notes

For a case on refiling of action, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) para 5629.

Cases referred to

Birkett v James [1977] 2 All ER 801 (refd)
Chua Cheng Wan v Chua Thiam Siew & Ors [2000] 1 CLJ 433 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)(b), (c), (d), O 92 r 4

Appeal from:

CW Leong (*Tee, Tan & Partners*) for the plaintiff.
Haryaty bte Ibrahim (*Tang & Lee*) for the defendant.

Kamalanathan Ratnam J:

Facts

On 30 June 1992, the plaintiff as the developer and both the defendants as land owners, entered into a joint venture agreement ('the agreement') to construct houses on the defendants' land. The land was designated agricultural land. According to the terms of the agreement, the plaintiff was to complete the conversion process from agriculture to housing within the stipulated period in the agreement. The plaintiff however decided to convert to category industry. The plaintiff entered a caveat over the said land. The defendants gave notice to the registrar to remove the caveat. The

A defendants terminated the agreement by their solicitors' letter dated 28 September 1995. The plaintiff thus filed this suit seeking amongst others a declaration that the termination of the agreement is invalid and also for specific performance of the said agreement.

The defendants applied to strike out the said writ and statement of B claim pursuant to O 18 r 19(1)(b), (c) and/or (d) of the Rules of the High Court 1980 ('the RHC'). The learned deputy registrar granted order in terms. However no draft order was even filed nor a fair order extracted in respect of the decision of the deputy registrar given on 22 December 2000. On perusing the file, I note that the order recorded reads as follows:

C > Permohonan defendan di Lampiran 6 untuk A 18 k 19 dibenarkan dengan kos.

The plaintiff appealed against that decision.

Findings of the court

D The defendants averred in their affidavit in support of the application to strike out, that prior to the filing of this writ, the plaintiff had taken out three other proceedings in respect of the same subject matter in that the plaintiff had:

(1) filed in the High Court at Shah Alam, Originating Summons No 21–189–96;

E (2) filed in the High Court at Shah Alam, Originating Summons No 21–216–96; and

(3) filed in the High Court at Kuala Lumpur, Civil Suit No 22–269–96.

The defendants further averred that the plaintiff having withdrawn (1) on F 27 June 1996, the learned judge struck out the said originating summons. The other two matters (2) and (3) were also struck out by the respective courts because the plaintiff's solicitor had failed to attend court on the days the matters were fixed. The plaintiff's application to reinstate the writ (item (3)) was also dismissed by the learned judge. It is the defendants' case that the plaintiff ought to have appealed against that decision and ought not G to be permitted to re-file a similar suit as this is an abuse of the process of the court.

In his reply, the director of the plaintiff averred that both the actions (1) and (2) were applications for extension of the caveat which the plaintiff had entered over the defendants' land. The plaintiff had to withdraw (1) as it H was not in order. Hence, the plaintiff filed (2). However, before (2) could be heard, the land registry had already removed the caveat, thus making (2) redundant and purely academic. Hence the plaintiff withdrew (2). With regard to (3), the plaintiff averred that on a mention date its solicitor had failed to attend before the learned judge as the date was not entered into its counsel's diary. The application to reinstate and the affidavit in support I were exhibited. The learned judge however refused to reinstate.

At the outset of the hearing of the appeal before me, both counsel conceded that the application to strike out this writ before the deputy

registrar was solely on technical grounds and that both parties had not gone into the merits. Although the defendants had failed to file, and extract a fair order of the decision of the learned deputy registrar given on 22 December 2000, I am satisfied with the assurances given by both counsel that merits were not considered. However, it is my judgment that it is of no concern whether the deputy registrar had or had not gone into the merits. What is of paramount importance is whether the learned judge who struck out the earlier writ (item (3)) had gone into the merits. It is my view that if that learned judge had indeed considered the merits of the case and then struck out the writ then the plaintiff's only recourse is to appeal against that decision. Again I note the dismal failure of counsel to extract the order of the learned judge. There seems to be a growing tendency amongst lawyers not to extract orders. Counsel must appreciate that any judge hearing an appeal or an appellate judge can only hear and decide when called upon to do so, on an appeal, if he knows what the appellant is appealing against. The only way the said judge can make a fair decision is to have before him the perfected order that the appellant is appealing against. Otherwise, each party will be submitting on matters that each feels is relevant and the appellate judge would be called upon to decide on a matter not knowing what the views of the earlier judge were. If this happens, the party appealing without the order must face the repercussions.

In this case, the judge who struck out the earlier writ (item (3)) because the solicitor for the plaintiff did not attend a mention or possibly a case management date, also refused to reinstate the writ on the grounds that the explanation of the plaintiff's solicitors was unacceptable. But nowhere have the defendants averred and nor have they supported by an order of the court that the learned judge had gone into the merits. To my mind, striking off a writ because of non-attendance clearly means that the court had not gone into the merits. In such a situation, there is nothing to appeal against. The plaintiff is perfectly at liberty to refile this suit.

The defendants relied on *Chua Cheng Wan v Chua Thiam Siew & Ors* [2000] 1 CLJ 433. The facts therein were totally different. The court issued a show cause notice to the plaintiff for failing to file a summons for directions which he had been instructed to file. On the hearing of the show cause notice, the judge struck out the writ and statement of claim for non prosecution. On the hearing of an application by the plaintiff to reinstate an action struck off, the court held that it had no jurisdiction to reinstate and that the plaintiff ought to have appealed. The court however held that even if the predicament of the plaintiff arose from a mistake of his counsel, it would not have been a reason for the exercise of the discretion of the court to reinstate. In other words, the court recognized the inherent jurisdiction of the court to exercise its discretion. This is clearly provided under O 92 r 4 of the RHC which reads as follows:

> Inherent powers of the court
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> For the removal of doubt it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

The learned judge in that case in refusing to reinstate relied on the principles enunciated in *Birkett v James* [1977] 2 All ER 801, wherein the House of Lords held that 'the court has the power to dismiss an action for want of prosecution not only where the plaintiff's default has been intentional and contumelious but also where there has been inordinate and inexcusable delay on his or his lawyer's part giving rise to a substantial risk that a fair trial would not be possible or would cause serious prejudice to the defendant'. In *Chua*'s case, the learned judge was of the view that 'it would ... not promote the due administration of the law or the promotion of justice for a court to have a power to reinstate a proceeding of which it has finally disposed. Striking out an action disposes of the case finally so far as the court hearing the matter is concerned'. Hence, the learned judge was of the view that only an appeal was possible against that decision. With the greatest of respect, I do not subscribe to this view. Striking off a writ does not 'finally' dispose of the matter. A matter before the court is 'finally' concluded when evidence (whether oral or by affidavits) is adduced and the merits heard and adjudicated. Then it is conclusive and final and any decision made is final and the aggrieved party's next cause is to appeal. But where the merits have not been heard as in this case, it is my judgment that this court can and must exercise its inherent discretion and if the justice of the case warrants the exercise of the discretion in favour of reinstating, it can and must.

But in this case before me, there is no question of reinstatement. The plaintiff has simply refiled. Since the merits had not been heard, I am of the view that the plaintiff must be given the liberty to refile. I therefore allowed the appeal and set aside the order of the deputy registrar dated 22 December 2000 with costs to the appellant.

Appeal allowed with costs.

Reported by Chew Phye Ken